Supreme Court, U. S.
FILED
FEB 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-992

ANAHEIM OPERATING, INC.,
a Corporation Doing BUSINESS as
SHERATON - ANAHEIM,
and PETER J. LORUSSO,

Petitioners,

vs.

HOTEL & RESTAURANT EMPLOYEES &
BARTENDERS UNION, LONG BEACH &
ORANGE COUNTY, LOCAL 681, AFL-CIO,
An Unincorporated Association,

Respondent.

BRIEF OF RESPONDENT

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LONG BEACH REPORTER

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BRIEF OF RESPONDENT

Respondent HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS UNION, LONG BEACH AND ORANGE COUNTY, LOCAL 681, AFL-CIO, respectfully replies to the Petition for Writ of Certiorari and submits the Petition should be denied.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari asks this Court to review the judgment of the Court of Appeals of the State of California in *Hotel and Restaurant Employees, etc. vs. Anaheim Operating, Inc., etc.* 82 Cal. App. 3d 737, 147 Cal. Rptr. 510 (1978).

This matter commenced in the Superior Court of the State of California. Respondent Union filed a complaint therein alleging defamation on the part of petitioners. The defamatory statement alleged "facts" to show

> "what the union's connection with organized crime and other 'underworld' elements are . . ."

The petitioners demurred on the grounds the California Superior Court had no jurisdiction. The contention of petitioners was that State Court jurisdiction had been pre-empted by the National Labor Relations Act. The demurrer was sustained without leave to amend and judgment entered thereon. The Union appealed. The California Court of Appeals reversed the trial court, holding the National Labor Relations Act did not pre-empt State Court jurisdiction for a defamation action.

QUESTION PRESENTED

Should the Supreme Court reverse its prior decisions recognizing the National Labor Relations Act does not pre-empt a State tort action where the subject matter thereof is of only peripheral concern to the National Labor Relations Board?

ARGUMENT

The California State Court Of Appeals Decision Raises No New Important Question Of Law Not Heretofore Settled By This Court.

The first ground urged in support of the Petition for Writ is that there is an important question remaining as to whether a Union can bring a defamation action against an employer based on statements made during a representation campaign. The petitioners allege the employer conduct is "protected expression" within the meaning of the National Labor Relations Act. No citation of authority supports that allegation. The allegation begs the question. If there is a question presented by the Writ, the question is whether malicious defamation is to be included in protected expression. The protected expression claimed by the defendants is set forth in Section 8(c) of the National Labor Relations Act, 29 USC §158 (c). That section provides:

> "the expressing of any *views, argument,* or *opinion,* or the dissemination thereof, whether

in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."
(emphasis added)

Nothing in Section 8 of the Act indicates a willful mis-statement of fact is protected.

The petitioners contend the prior decisions of this Court as to defamation actions should be reversed if the plaintiff is a labor union. This is the only distinction the petitioners make between this Court's decisions and the present case. This Court has previously ruled in *Linn vs. Plant Guard Workers*, 383 US 53 (1966) a State does have an interest in a libel published during a labor dispute. The only criteria applied by this Court was the requirement of "actual malice" as defined in *New York Times vs. Sullivan*, 378 US 254 (1964).

Subsequent decisions of this Court have upheld the State Court jurisdiction of tort actions. See *Letter Carriers vs. Austin*, 418 US 264 (1974). Furthermore the decision has been approved by this Court in *Farmer vs. Carpenters*, 430 US 290 (1977) and *Sears, Roebuck and Company vs. San Diego County District Council of Carpenters*, ___ US ___ (May 15, 1978).

Ultimately, the only point made by petitioners is that a Union should not have a right to bring a defamation action in the State Court. The California Court of Appeals in its decision pointed out it has been held a Union is subject to equal status with an individual or a corporation. A Union is entitled to sue or be sued. To say a Union can be sued for libel but cannot sue would create a "gross anomaly." *Daniels vs. Sanitarium Ass'n, Inc.*, 59 Cal. 2d 602, at 610. The Court of Appeals decision also pointed out the analogy between a Union's interest and that of a corporation, citing *DiGiorgio Fruit Corporation, vs. AFL-CIO*, 215 Cal. App. 2d 560 at 571. Therefore the Court concluded the Union's interest in remaining free of malicious libel was protected by state law. See Page A-17 attached to the Petition for Writ Certiorari.

The Court of Appeals properly points out at footnote 11 state suits have been brought by companies against Unions for libel. In addition the Court notes with approval the same contention was made and rejected in *Mooi Roofing Company vs. DeYoung*, 9 Mich. App. 295. (see page A-17, footnote 11, and page A-18 attached to the Petition.)

THE COURT OF APPEALS DECISION DOES NOT MISCONSTRUE THE DECISIONS OF THIS COURT.

The second justification for the Petition submitted by petitioners is an alleged misconstruction of the decisions of this Court. The contention is made that "the nature of organization campaign speech

is a matter of central concern to the LMRA" . . . (petitioners brief, page 10).

Again the petitioners beg the question. The question is whether the "truth or falsity" of campaign statements is a matter of peripheral concern to the Board. The Board underscored quite clearly the truth or falsity is but a peripheral concern in its three inconsistent decisions in *Hollywood Ceramics Company, Inc.*, 140 NLRB No. 36; *Shopping Kart Food Market, Inc.*, 228 NLRB No. 190, and *General Knit of California*, 239 NLRB No. 101. The petitioners indicate these cases do reflect a "shifting policy" of the NLRB with the regulation of representation election speech. It can hardly be claimed the willful dissemination of false statement of facts under such circumstances can indicate anything other than "peripheral concern" of the NLRB.

It should be noted at the time the Court of Appeals decision issued the then posture of the NLRB was that the NLRB would not consider the truth or falsity of campaign statements. At that time the Board's position was the *Shopping Kart* decision, supra. The petitioners contended *Shopping Kart* made clear the State Court was without jurisdiction. *Shopping Kart* negated Board concern with the defamatory statements. Now the change in the membership of the NLRB has resulted in *Shopping Kart* being reversed by *General Knit.*

It should be noted those cases are NLRB decisions. No Supreme Court decision has reversed the *Linn*

decision. In fact each subsequent decision in the area of law cites with approval a language of *Linn.*

The decision of the Court of Appeals which is attached to the Petition indicates the Court's anaylsis of the original decision, *San Diego Bldg. Trades Council vs. Garmon*, 359 US 236 commencing on page A-6 and continuing through A-10. Commencing at the bottom of A-10 the Court of Appeals then analyzed the *Linn* decision and basis for State Court jurisdiction. Basically the Court pointed out the fact the NLRB has limited authority and has no basis for awarding damages or other penalties. Particularly the NLRB has no power to vindicate a reputation. See page A-13.

It is respectfully submitted the reading of the Court of Appeals decision can only lead to the conclusion the Court of Appeals correctly construed and applied the prior holdings of this Court that a willful defamation is actionable in State Court without regard to the National Labor Relations Act.

It is therefore respectfully submitted the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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